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In the Supreme Court of the United States

OCTOBER TERM, 1986

ETSI PIPELINE PROJECT, PETITIONER

v.

STATE OF MISSOURI, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF MISSOURI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

CHARLES FRIED
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

RALPH W. TARR
Solicitor

LOUIS D. MAURO
Senior Attorney
Department of the Interior
Washington, D.C. 20240

SUSAN J. CRAWFORD
General Counsel
Department of the Army
Washington, D.C. 20310

FRED R. DISHEROON
KATHLEEN P. DEWEY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Secretary of the Interior may enter into a contract, pursuant to the federal reclamation laws, to supply unutilized irrigation water from a Missouri River mainstem reservoir for industrial use.

PARTIES TO THE PROCEEDING

A full list of the parties to this proceeding is set out in the government's petition for a writ of certiorari. See Fed. Pet. II.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a)[1] is reported at 787 F.2d 270. The opinion of the district court (Pet. App. 45a-72a) is reported at 586 F. Supp. 1268.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in this case by the private petitioner, ETSI Pipeline Project (No. 86-939).

JURISDICTION

The judgment of the court of appeals (Pet. App. 73a) was entered on March 13, 1986. Petitions for rehearing were denied on July 10, 1986 (Pet. App. 74a-75a). On September 26, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including December 7, 1986 (a Sunday), and the petitions were filed on December 8, 1986. This Court granted the petitions for a writ of certiorari on March 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 9 of the Flood Control Act of 1944, ch. 665, 58 Stat. 891, and Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), are set out in the Addendum to this brief.

STATEMENT

Near the close of World War II, Congress enacted an omnibus flood control bill authorizing a wide range of water resource programs to protect the nation from devastating floods and to promote the post-war domestic economy. See Flood Control Act of 1944 (FCA), ch. 665, 58 Stat. 887 (partially codified in scattered sections of Titles 16, 33, and 43 U.S.C.). Congress specifically approved the Pick-Sloan Plan, a comprehensive multiple-purpose development program for the Missouri River Basin. FCA § 9, 58 Stat. 891. This massive program, which is jointly administered by the Secretary of the Army and the Secretary of the Interior, provides flood control, navigation, reclamation, and hydropower benefits for the midwestern United States. It includes numerous mainstem and tributary reservoirs that are intended, among other purposes, to conserve water for irrigation use. The anticipated irrigation needs, however, have not yet fully materialized. The Secretary of the Interior, who is responsible for the reclamation aspects of the Pick-Sloan program, has therefore applied some of the unutilized irrigation water to other beneficial uses in ac-

cordance with Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), which authorizes him to supply water from reclamation projects for miscellaneous purposes.

In 1982, the Secretary entered into a water service contract to provide unutilized water presently stored for irrigation purposes at Lake Oahe, a mainstem reservoir in South Dakota, to petitioner ETSI Pipeline Project (ETSI) for use in a proposed coal slurry pipeline. Respondents—the states of Missouri, Iowa, and Nebraska, the Kansas City Southern Railway, and several other parties—filed suit seeking to enjoin performance, contending, among other allegations, that the Secretary of the Interior lacked statutory authority to enter into the ETSI contract. The United States District Court for the District of Nebraska agreed and entered an order permanently enjoining performance of the contract. A court of appeals panel affirmed by a divided vote and an equally divided en banc court denied rehearing.

A. The Formulation of the Pick-Sloan Plan

The Pick-Sloan program is the product of a vigorous national debate over the proper development of the Missouri River Basin, a watershed that encompasses roughly one-sixth of the contiguous United States. It reflects a carefully wrought compromise between the interests of the arid and semi-arid upper basin states—including Montana, North Dakota, South Dakota, and Wyoming—which viewed the Missouri River as a vitally important resource for agricultural and industrial use, and the interests of the more humid lower basin states—including Iowa, Kansas, Missouri, and Nebraska—which sought development of the Missouri River for navigation and flood control purposes.[2]

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[2] See generally M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination* (1955) [hereinafter *The Pick-Sloan Plan*]; Guhin, *The Law of the Missouri*, 30 S.D. L. Rev. 347 (1985).

1. Congress recognized the need to develop the Missouri River Basin early in this century and authorized the Secretary of the Army and the Secretary of the Interior to investigate possible projects within their respective jurisdictions.[3] But the Missouri River's record floods of 1943, which caused nearly $50 million in damages, created the impetus for immediate congressional action. On May 13, 1943, the House Committee on Flood Control adopted a resolution calling upon the Army to review appropriate flood control measures.[4]

The Army Corps of Engineers' Missouri River Division Engineer, Colonel Lewis Pick, prepared a report, the

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[3] Congress, from 1912 to 1927, authorized the Army to make navigational improvements between Sioux City, Iowa, and St. Louis, Missouri. See Rivers and Harbors Act of 1927, ch. 47, § 1, 44 Stat. 1013; Rivers and Harbors Act of 1925, ch. 467, § 1, 43 Stat. 1188; Rivers and Harbors Act of 1917, ch. 49 § 1, 40 Stat. 259; Rivers and Harbors Act of 1912, ch. 253, § 1, 37 Stat. 219. It also authorized the Army to study the prospects for further navigational and flood control improvements (Rivers and Harbors Act of 1927, ch. 47, § 4, 44 Stat. 1020; Flood Control Act of 1928, ch. 569, § 10, 45 Stat. 538) and the Army submitted a lengthy report. See H.R. Doc. 238, 73d Cong., 2d Sess. (1934). Shortly thereafter, Congress approved construction of the Fort Peck Reservoir on the upper reaches of the Missouri River to improve downstream navigation (Rivers and Harbors Act of 1935, ch. 831, § 1, 49 Stat. 1034) as well as the number of minor flood control projects (Flood Control Act of 1938, ch. 795, § 4, 52 Stat. 1218). See *The Pick-Sloan Plan* 73. Congress, through Section 2 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (43 U.S.C. 411), and Section 9 of the Reclamation Project Act of 1939, 43 U.S.C. 485h, also authorized the Interior Department to investigate projects that would secure water supplies for irrigation, industrial and municipal uses in the arid regions of the nation. In 1939, the Interior Department's Bureau of Reclamation initiated a comprehensive study of reclamation possibilities in the Missouri River Basin.

[4] See *Flood Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control*, 78th Cong., 1st Sess. 1-24, 99-103, 884-887 (1944) [hereinafter *H.R. 4485 House Hearings*]; 90 Cong. Rec. 4131 (1944) (reprinting resolution); see also *The Pick-Sloan Plan* 3-5, 51-53.

"Pick Plan," that proposed a comprehensive plan for improvement of the Missouri River Basin. H.R. Doc. 475, 78th Cong., 2d Sess. (1944). The report, submitted to Congress on March 2, 1944, suggested a broad development scheme, costing $481.6 million, that emphasized both navigational improvements and flood control.[5] Other federal agencies, including the Department of Agriculture, the Federal Power Commission, and the Interior Department's Bureau of Reclamation, agreed on the need for a comprehensive Missouri River Basin plan that would provide "the maximum feasible multiple-purpose use of water" and that would make due allowance "for any changed conditions that might arise in the future" (H.R. Doc. 475, *supra*, at 3; see generally *id.* at 5-13).[6] The Corps, in turn, recognized the need for coordinated inter-agency development, stating that the Pick Plan "establishes a broad framework for comprehensive basin-wide improvements" that "is flexible in that it proposes

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[5] The Pick Plan envisioned the construction of 12 multiple purpose reservoirs (including five mainstem reservoirs); diversion works for transporting water from the proposed Garrison mainstem reservoir in central North Dakota to the Devils Lake area in eastern North Dakota; and levees on the mainstem from Sioux City, Iowa, to the river's mouth. H.R. Doc. 475, *supra*, at 16, 18, 26-28; see *The Pick-Sloan Plan* 78-82; Guhin, *supra*, 30 S.D. L. Rev. at 358-359.

[6] See, *e.g.*, H.R. Doc. 475, *supra*, at 10 (comments of the Federal Power Commission) ("the details must, of necessity, be worked out step by step and the authorizing legislation should, therefore, permit wide latitude in the selection and modification of projects"); *id.* at 13 (comments of the Dep't of Agriculture) ("the extensive program contemplated would necessarily be carried out step by step, with the details formulated progressively in cooperation with other Federal agencies"). The Bureau of Reclamation, which was preparing its own plan, specifically emphasized that any plan for development of the Missouri River Basin "should be truly comprehensive in adequately providing not only for the control of floods and the improvement of navigation, but also for full development of irrigation, hydroelectric power production, and all other beneficial uses of water" (*id.* at 5-6). The Bureau further suggested that the Corps' plan be integrated with the Bureau's forthcoming plan (*id.* at 6).

sufficient latitude to permit such modifications thereof and changes therein as may be found advisable, and it should be augmented by appropriated work of other agencies duly constituted by law to perform such work" (*id.* at 4-5; see also *id.* at 29-30).

Colonel Reber of the Army Corps of Engineers provided the House Committee on Flood Control with a detailed exposition of the Pick Plan, repeatedly emphasizing that the proposed program would provide a broad and flexible framework for development of the Missouri River Basin.[7] The committee later added the proposal to its pending omnibus flood control bill, H.R. 4485, which authorized numerous flood control projects throughout the nation. See H.R. Rep. 1309, 78th Cong., 2d Sess. 23-25 (1944).[8]

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[7] See *H.R. 4485 House Hearings* 883-908, 1059-1078. Congress also heard testimony from Commissioner Bashore of the Bureau of Reclamation (*id.* at 957-972, 1078-1088), several governors from the Missouri River Basin states (*id.* at 936-956, 973-984), and various state and local officials (*id.* at 984-1057, 1089-1095). The Commissioner explained that the climatic differences within the Missouri River Basin could result in conflicts "between the beneficial, consumptive use of water in the drier areas for domestic, irrigation, industrial and mining purposes, and the use of waters in the humid areas to maintain flowing navigation channels" (*id.* at 958). He suggested that the Basin be developed through coordinated inter-agency efforts (*id.* at 960, 1078-1079) and that Congress exercise care to ensure that the authorized works would not curtail other beneficial water uses (*id.* at 960, 970, 1088). The governors of the upper basin states joined in that suggestion. See *id.* at 945, 974, 978, 982-983.

[8] The committee inserted provisions stating that nothing in the authorization shall be construed to create a demand upon upper basin water resources in excess of that presently authorized by law and that mainstem storage may be placed on tributaries in order to make more water readily available for agricultural and industrial use. See H.R. 1309, *supra*, at 24-25. Rep. Case of South Dakota proposed these provisions to "guard against any loss of rights now existing" and to "emphasize the flexibility [of the Corps' plan] and express the thought of Congress that where the benefits from the project could be increased by a certain modification, it should be done" (90 Cong. Rec. 4222-4224 (1944)).

2. Shortly thereafter, the Bureau of Reclamation, through the efforts of its Montana engineer, W.G. Sloan, completed its own comprehensive plan for development of the Missouri River Basin, the so-called Sloan Plan, which emphasized use of water resources for irrigation in the upper basin states. S. Doc. 191, 78th Cong., 2d Sess. (1944). This lengthy report presented a detailed analysis of the water needs of each main drainage area in the basin and proposed construction of ninety reservoirs (including 3 mainstem reservoirs) that would provide reclamation, hydropower and flood control benefits (*id.* at 2-4, 28-120).[9] The Bureau and the Corps both acknowledged that the Pick Plan and the Sloan Plan differed in several significant respects, but each agreed that the projects were largely complementary and that differences could be worked out through inter-agency cooperation as the projects proceeded (*id.* at 2-4, 6-8, 120-123). The Sloan Plan was referred to the Senate and House Committees on Irrigation and Reclamation.[10]

Meanwhile, on May 8-9, 1944, the House debated H.R. 4485. Two issues figured significantly in that debate. First, representatives from the western states expressed concern that the omnibus bill as a whole, by vesting the

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[9] See generally *The Pick-Sloan Plan* 82-88; Guhin, *supra*, 30 S.D. L. Rev. at 359-361. The fully developed plan would provide irrigation for 4.7 million acres of dry land and would produce nearly 4 billion kilowatt-hours of power annually. S. Doc. 191, *supra*, at 2-3, 21-25. As in any Bureau reclamation project, irrigators and power users would be expected to repay the project costs assignable to irrigation and power production (*id.* at 4). See Reclamation Project Act of 1939, § 9, 43 U.S.C. 485h. The Bureau estimated that, of the total project cost of $1.2 billion, $741 million would be repayable.

[10] See *Control and Use of the Water Resources of the Missouri River Basin: Hearings on S. 1915 Before a Subcomm. of the Senate Comm. on Irrigation and Reclamation*, 78th Cong., 2d Sess. (1944) [hereinafter *S. 1915 Hearings*]; *Missouri River Basin—Conservation, Control, and Use of Water Resources Including Floodwaters: Hearings on H.R. 4795 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 2d Sess. (1944) [hereinafter *H.R. 4795 Hearings*].

Corps with substantial flood control powers, would affect the authority of the arid and semi-arid western states to exercise their traditional control over water resources. See 90 Cong. Rec. 4125, 4133-4134, 4139, 4197, 4207-4208, 4228 (1944). The chief concern centered on Section 4 of the bill, which authorized the Corps to provide surplus reservoir storage to meet local water needs.[11] Second, representatives from North Dakota objected that the Pick Plan specifically would deprive the upper Missouri River Basin states of control over water use within their borders. *Id.* at 4140-4142, 4212-4218.[12] The House

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[11] Under the existing law, communities could obtain storage space at proposed reservoirs by paying the associated costs. Smaller communities had difficulties in raising the large lump sums necessary, and their water needs tended to arise after the reservoirs had been built. See 90 Cong. Rec. 4125-4127, 4197 (1944). Section 4 removed these obstacles by permitting the Army to market surplus water "at such prices and on such terms" as it deemed reasonable. But Rep. Chenoweth (Colo.) expressed concern, later echoed by Rep. Robinson (Utah), that Section 4 could impair water rights obtained under state law (90 Cong. Rec. 4125, 4133-4134, 4197 (1944)). Rep. Curtis (Neb.), a proponent of the bill, stated that "water appropriated for irrigation is not surplus water," that "section 4 would not be controlling in reference to irrigation waters," and that "where there is storage space available for irrigating farm lands that the regulation of that shall be turned over to the Bureau of Reclamation" (*id.* at 4133-4134). Rep. Whittington (Miss.), the chairman of the Flood Control Committee, agreed, stating that Section 4 "would apply only to waters that were surplus and not needed for irrigation or other purposes" (*id.* at 4134). Rep. Curtis added that section 6 of the bill, which authorized the Secretary of the Interior to regulate reclamation storage at Corps flood control facilities, ensured that "control with reference to the available space for irrigation water shall be exercised by the Bureau of Reclamation" (*ibid.*), a point that was reiterated throughout the debate (see *id.* at 4123, 4126 (Rep. Whittington); *id.* at 4130 (Rep. Curtis); *id.* at 4141 (Rep. Whittington)).

[12] Rep. Burdick (N.D.) contended that the Pick Plan would give the Corps control over irrigation works and permit the Corps to deplete basin waters for navigation and flood control purposes (90 Cong. Rec. 4140 (1944)). Rep. Case (S.D.) responded that the special provision he attached to the Pick Plan (see note 8, *supra*), disclaiming authorization of new water uses below Sioux City,

ultimately passed the bill with minor amendments (*id.* at 4232) following repeated suggestions that the Corps' Pick Plan would be coordinated with the Bureau's Sloan Plan (*id.* at 4119, 4133, 4143-4147, 4214, 4217, 4223-4224).

The question of state control of water resources arose again in Senate hearings on H.R. 4485.[13] Senator Millikin (Colo.) proposed and advocated the so-called "O'Mahoney Amendment," which set forth detailed requirements for federal-state coordination of Corps navigation and flood control plans and which gave upstream consumptive water uses, including irrigation, domestic, and industrial applications, priority over downstream navigational uses.[14] The Secretary of the Interior, Harold

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Iowa, protected the upper basin from downstream depletion (*ibid.*). He noted that the Pick Plan recognized that the Bureau would construct new irrigation works in the upper basin and that the Bureau's Sloan Plan would soon be available (*id.* at 4141). He stated that the Pick Plan "reserves for use above Sioux City the water not previously authorized for projects below Sioux City but makes no distribution of this reservation, leaving that for allocation by agreement among interested parties as reservoirs are constructed from time to time and storage becomes available for distribution" (*id.* at 4142). Rep. Burdick and Rep. Lemke (N.D.) later proposed an amendment requiring that future navigational uses be subordinated to reclamation uses (*id.* at 4212). That amendment was rejected (*id.* at 4218).

[13] See *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 413-420, 449-455, 465-486, 499-533, 537-622, 641-755, 761-786, 814-816 (1944) [hereinafter *H.R. 4485 Senate Hearings*].

[14] See *H.R. 4485 Senate Hearings* 535-537, 675-728. The O'Mahoney Amendment was precipitated, in part, by the pending omnibus rivers and harbors bill (H.R. 3961, 78th Cong., 2d Sess. (1944)), which included an authorization to dredge a nine-foot channel in the Missouri River from Sioux City, Iowa to the river's mouth. See H.R. Rep. 1000, 78th Cong., 2d Sess. 73 (1944); *River and Harbor Bill: Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors*, 78th Cong., 2d Sess. 82 (1944)). The upstream states believed that authorization of that project would deplete water available for upstream consumptive use. See *Missouri River Basin: Hearings on H.R. 3961 Before the House Comm.*

Ickes, also suggested certain amendments to clarify the responsibilities of the Corps and the Bureau.[15] With respect to the Missouri River Basin, there was general agreement among the Corps, the Bureau, the state governors, and members of Congress that the Pick and Sloan

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on Rivers and Harbors, 78th Cong., 2d Sess. (1944). The House, in response, ultimately added a provision to the bill stating that the nine-foot channel would create no new water rights that would displace existing upstream uses. See 90 Cong. 2835-2846 (1944). The upstream states expressed continued concern in Senate hearings on H.R. 3961, where discussion centered on a proposal by Senator O'Mahoney (Wyo.) to provide general protection to upstream interests. See *Rivers and Harbors Omnibus Bill, Missouri River Project, et al.: Hearing on H.R. 3961 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong. 2d Sess. (1944). The O'Mahoney proposal was later modified and introduced as an amendment to both H.R. 3961 and H.R. 4485. See generally *The Pick-Sloan Plan* 91-93; Guhin, *supra*, 30 S.D. L. Rev. at 383-411.

[15] See *H.R. 4485 Senate Hearings* 310-314, 455-465. Secretary Ickes proposed, among other matters, that Section 4 (which permitted the Corps to sell surplus water for domestic and industrial uses) be amended to provide that "the Federal reclamation laws shall govern the disposition for domestic or industrial uses of surplus water from any reservoir utilized for irrigation purposes pursuant to section 6 of this Act" (*id.* at 311-313), thus "extend[ing] these provisions of the reclamation laws to reservoirs where the other provisions of the reclamation laws would be made applicable by section 6 of the bill" (*id.* at 457-458). He also proposed that Section 6 (which authorized the Secretary to prescribe regulations for reclamation use of reservoir storage) be substantially rewritten for purposes of conforming the section to "various technical features of the Federal reclamation laws" (*id.* at 313), including the fact that those laws "are largely designed to authorize a system of contractual relationships" (*id.* at 458). Finally, he suggested that a proviso be added to the Missouri River Basin authorization indicating that "nothing in this Act shall be construed as authorizing any demand upon the water resources of the Missouri River Basin that will adversely affect the beneficial consumptive use of such water resources for municipal, domestic, and livestock water supply, for irrigation of arid and semiarid lands and for mining and industrial purposes" (*id.* at 313), thus "assur[ing] the States and the people of the upper basin that the water upon which their agricultural economy is dependent may not be taken from them" (*id.* at 459).

plans could be successfully coordinated to produce a comprehensive program for development of the Missouri River Basin.[16] On June 22, 1944, the Senate Committee on Commerce issued its report recommending passage of an amended bill that included some of Secretary Ickes' recommendations but did not contain the O'Mahoney Amendment. See S. Rep. 1030, 78th Cong., 2d Sess. (1944).[17]

3. Meanwhile, the Corps and the Bureau continued their efforts to conciliate the Pick and Sloan plans. The chief difference centered on the number and capacity of the mainstem reservoirs between Fort Peck, Montana, and Sioux City, Iowa.[18] On October 25, 1944, the Corps

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[16] See *H.R. 4485 Senate Hearings* 467, 476 (Gov. Sharpe (S.D.)); *id.* at 507-510, 513-514, 648, 651, 668-669, 697 (Col. Reber); *id.* at 522, 524 (Mr. Sloan); *id.* at 524-525 (Sen. Robertson (Wyo.)); *id.* at 545-546 (Sen. Cordon (Or.)); *id.* at 609-610 (Rep. Case (S.D.)).

[17] The Senate committee did not adopt the Secretary's suggested amendment (see note 15, *supra*) of Section 4, which would have required application of the reclamation laws to the disposition of surplus water from reservoirs utilized for irrigation purposes under Section 6. Instead, the committee amended that section (renumbering it as Section 6) to provide that "no sale of such water shall adversely affect existing lawful uses" (S. Rep. 1030, *supra*, at 4). The committee adopted the Secretary's proposal concerning Section 6 (now renumbered as Section 8), which clarified the Secretary's role in controlling irrigation storage at Army reservoirs (*ibid.*), but it did not adopt the Secretary's suggestion for protecting upstream water consumers in the Missouri River Basin. The committee also added a provision creating a "Missouri River Commission" to assist in planning and controlling navigation and flood control projects in the basin (*id.* at 15). The committee specifically rejected the O'Mahoney Amendment (*id.* at 30-31).

[18] See *H.R. 4485 Senate Hearings* 507-510. The Pick Plan called for the construction of 5 mainstem reservoirs, including the 17 million acre-foot Garrison Reservoir, which was central to the Corps' flood control objectives, and four smaller reservoirs at Oak Creek, Oahe, Fort Randall, and Gavins Point (*ibid.*). The Sloan Plan called for the construction of 3 mainstem reservoirs, including the 19.6 million acre-foot Oahe Reservoir, which was central to the Bureau's reclamation objectives, and two smaller reservoirs at Fort Randall and Big Bend (*ibid.*).

and the Bureau issued a joint report concluding that their respective plans could be coordinated if the agencies exercised shared responsibility—based on each agency's statutory mission and practical expertise—in design as well as in administration at each of the multiple purpose mainstem reservoirs. See S. Doc. 247, 78th Cong., 2d Sess. 1 (1944).[19] This approach yielded a comprehensive plan for six mainstem reservoirs—the existing Fort Peck Reservoir, a large capacity reservoir at Garrison, a large capacity reservoir at Oahe, and three smaller reservoirs at Fort Randall, Big Bend, and Gavins Point (*id.* at 3).[20] Each of these reservoirs would be truly multiple purpose in character, serving "the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power and other uses" (*ibid.*).

Shortly thereafter, on November 16, 1944, the Senate commenced debate on H.R. 4485. A focal point, again, was the matter of protecting the arid states' traditional control of water within their borders. The Senate ultimately adopted, as Section 1 of the bill, a modified version

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[19] The coordinating document specifically recognized as "basic principles" that: "(a) The Corps of Engineers should have the responsibility for determining mainstem reservoir capacities and capacities for tributary reservoirs for flood control and navigation[;] (b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development[;] (c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with other beneficial uses of water." S. Doc. 247, *supra*, at 1. The Pick Plan and the Sloan Plan already provided that the agencies would share a similar functional division of responsibilities in administering the reservoir system. See H.R. Doc. 475, *supra*, at 3-4, 7; S. Doc. 191, *supra*, at 3-4. See also discussion at pages 24-27, *infra*.

[20] The joint report estimated approximate storage capacities for the five new reservoirs, noting that "final storage capacities to be selected for the above reservoirs will be jointly agreed upon after more detailed plans and cost estimates have been made" (S. Doc. 247, *supra*, at 3).

of the O'Mahoney Amendment.[21] The Senate also adopted, with slight modifications, the commitee's version of Section 6, authorizing the Secretary of the Army to supply surplus water for domestic and industrial use, and Section 8, authorizing the Secretary of the Interior (upon approval of the Army) to construct and operate irrigation works at Army reservoirs.[22] Finally, the Senate removed the Missouri River Basin project from the general list of flood control works and created an entirely new provision—Section 9—that authorized both the Pick Plan and the Slcan Plan, as coordinated by the Corps-Bureau joint report. See 90 Cong. Rec. 8553 (1944).

Section 9, reflecting the hybrid character of the Corps-Bureau compromise, implemented the proposed Missouri River Basin program through three basic steps. First, Section 9(a) expressly adopted the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating document.[23] Next, Section 9(b) specified that the work to be performed by the Army would be an extension of previously

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[21] See 90 Cong. Rec. 8485-8493, 8546-8548 (1944). These provisions, which were ultimately enacted, provided for federal-state coordination in future Corps and Bureau projects (FCA § 1(a) and (c), 58 Stat. 888-889) and provided that, in the case of projects authorized by the bill, use of water for navigation "shall be only such use as does not conflict with any beneficial consumptive use" in states lying wholly or partly west of the 98th meridian (FCA § 1(b), 58 Stat. 889).

[22] See 90 Cong. Rec. 8551-8553 (1944). The Senate modified Section 6 to state that the Army may "make contracts for" rather than "sell" surplus water (90 Cong. Rec. 8551 (1944)) and added a provision to Section 8 excluding the Section's application to certain previously constructed reservoirs (*id.* at 8552-8553). See FCA §§ 6, 8, 58 Stat. 890, 891.

[23] "The general comprehensive plans set forth in House Document 475 [the Pick Plan] and Senate Document 191 [the Sloan Plan], seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements." FCA § 9(a), 58 Stat. 891.

authorized flood control works, thereby assuring continuity in the Army's Missouri River Basin programs.[24] Finally, Section 9(c) specified that the Interior Department's activities, though authorized in a flood control act, would nevertheless be governed by the reclamation laws in accordance with the basin-wide cost and benefit findings contained in the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating document.[25] Section 9(c) accordingly ensured that the Interior Department would employ traditional reclamation principles in carrying out its responsibilities.[26]

Following a House-Senate conference, Congress passed the Senate version of H.R. 4485, including Section 9, thus approving the Pick-Sloan Plan.[27]

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[24] "The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers." FCA § 9(b), 58 Stat. 891.

[25] "Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that the irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands." FCA § 9(c), 58 Stat. 891.

[26] In addition, Section 9(d) authorized an appropriation of $200 million for the partial completion of the Corps works, while Section 9(e) authorized an equal appropriation for partial completion of the Bureau works. See FCA § 9(d) and (e), 58 Stat. 891. The Senate omitted previous provisions (see note 17, *supra*) establishing a Missouri River Commission and left, for another day, the possibility of establishing a "Missouri Valley Authority." See 90 Cong. Rec. 8421-8425 (1944).

[27] H.R. Conf. Rep. 2051, 78th Cong., 2d Sess. (1944); 90 Cong. Rec. 9259-9269, 9277-9287 (1944).

B. The Problem of Unutilized Irrigation Water

For the past one-half century, the Corps and the Bureau have labored diligently and cooperatively to implement the Pick-Sloan Plan. They have completed numerous Pick-Sloan facilities, including the five mainstem reservoirs, numerous tributary reservoirs, power generation facilities, and various irrigation projects.[28] The Pick-Sloan program has achieved several of its principal objectives: it has protected the lower basin states from the ravaging floods that once plagued the area; it has provided low flow water augmentation for navigation; and it has permitted full development of hydroelectric power. However, another important objective, the irrigation of arid and semi-arid lands, has not yet been fully realized. Construction of several large irrigation projects contemplated by the Pick-Sloan Plan has, for various reasons, been discontinued. As a result, a number of the reservoirs that were designed and constructed to accommodate irrigation storage have not been put to full reclamation use.[29] Meanwhile, other potential water uses have arisen

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[28] See Guhin, *supra*, 30 S.D. L. Rev. at 411-414. The mainstem reservoirs presently have a total normal storage capacity of 74 million acre-feet that is categorized for administrative purposes into four "storage zones" designated as (1) flood control (4,675,000 acre-ft); (2) flood control and multiple use (11,644,000 acre-ft); (3) carryover multiple use (39,467,000 acre-ft); and (4) inactive (18,335,000 acre-ft).

[29] Lake Oahe, South Dakota's 231 mile-long mainstem reservoir, is the leading example. Under the Corps of Engineers' Pick Plan, that reservoir would have had a capacity of only 6 million acre feet. The Pick-Sloan compromise adopted the Bureau of Reclamation's design, which specified an approximate capacity of 19.6 million acre feet, to provide, among other uses, for the irrigation of 750,000 acres of cropland in the James River Basin. See S. Doc. 247, *supra*, at 2-3; S. Doc. 191, *supra*, at 115. Congress later withdrew its authorization to construct the James River irrigation works. See Act of Aug. 14, 1964, Pub. L. No. 88-442, 78 Stat. 446. It subsequently reauthorized the James River project under a different

in the upper basin states, including water demand for development of the area's vast coal deposits.

Following the 1973 Arab oil embargo, the Interior Department, after careful study and consultation with the Army, proposed a program for supplying unutilized irrigation water from the Pick-Sloan program to assist in developing coal resources in the upper basin states.[30] The Interior Department determined that it could exercise its authority under Section 9(c) of the Reclamation Project Act of 1939, to market for industrial use unutilized irrigation water stored in Missouri River mainstem reservoirs.[31] The Army's Acting General Counsel recognized the need for consultation between the two agencies and suggested coordination and cooperation in determining whether the marketing of water for industrial purposes would adversely affect the reclamation and flood control purposes of the project.[32] Shortly thereafter, on February

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design (Act of Aug. 3, 1968, Pub. L. No. 90-453, 82 Stat. 624), but thereafter discontinued the project (WEB Rural Water Development Project Act of 1982, Pub. L. No. 97-273, §§ 3a, 4, 96 Stat. 1181, 1182). See Guhin, *supra*, 30 S.D. L. Rev. at 425-431. As a result, Lake Oahe presently has substantial unutilized irrigation storage capacity.

[30] See Report of the Ad Hoc Committee on Water Marketing (July 1, 1974) (C.A. App. 157-163). That report concluded that up to 3 million acre-feet of water stored, but not currently used, for irrigation purposes in the Missouri River mainstem reservoirs could be made available for industrial use (*id.* at 159). See generally Bureau of Reclamation, U.S. Dep't of the Interior, *Final Environmental Impact Statement: Water for Energy—Missouri River Reservoirs* (1977).

[31] See Memorandum from the Solicitor to the Secretary of the Interior (Nov. 27, 1974) (J.A. 120-127). Section 9(c) of the Reclamation Project Act authorizes the Secretary "to enter into contracts to furnish water for municipal water supply or miscellaneous purposes" provided that the contracts "will not impair the efficiency of the project for irrigation purposes" (43 U.S.C. 485h(c)).

[32] See Memorandum from Richard V. Kearney, Office of the Gen. Coun., Dep't of the Army, to the Chief, Office of Civil Functions (Dec. 16, 1974) (J.A. 128-135). Mr. Kearney concluded that

24, 1975, the Secretary of the Interior and the Secretary of the Army entered into a Memorandum of Understanding (MOU) stating that "the Secretary of the Interior may, pursuant to applicable authorities, both on his own behalf and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses" (J.A. 136).[33] The Secretary of the Interior subsequently approved two water service contracts that would provide water from mainstem reservoirs for energy development projects in the upper basin states.[34] The MOU expired, following several extensions, in 1978 (see *id.* at 138-144).

C. The Present Controversy

After the expiration of the MOU, ETSI Pipeline Project, a joint venture formed to design, construct, and operate a coal slurry pipeline from Wyoming's Powder River Basin to the southeastern United States, petitioned

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"if Interior certifies that the storage proposed to be marketed for industrial purposes * * * 'will not impair the efficiency of the project for irrigation,' 43 U.S.C. § 485h, the Army should be prepared jointly to cooperate with Interior * * * unless it determines, pursuant to its responsibility under S. Doc. 247, that such use would interfere with the operation of the reservoirs for flood control" (J.A. 135). He saw "no legal reason" why Interior could not provide mainstem water for industrial use (*ibid.*), but added that "the Secretary of Interior may not market the water from these reservoirs independently" (*id.* at 135 n.*).

[33] The Interior Department and the Army described the water marketing program to Congress in subsequent hearings. See *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 3-11, 22-62, 403-455 (1975) [hereinafter *1975 Industrial Water Marketing Hearing*].

[34] The Secretary entered into contracts with Basin Electric Power Cooperative providing water from Lake Sakakawea (the Garrison Reservoir) (J.A. 145) and with the State of Montana providing water from the Fort Peck Reservoir (see Montana Amicus Br. at 2-3). A third contract providing water to ANG Coal Gasification Company from Lake Sakakawea, refers to the MOU but was signed after the MOU expired (J.A. 146).

the Interior Department for a forty-year water service contract permitting the withdrawal of 20,000 acre-feet of water per year from Lake Oahe, an underutilized mainstem reservoir.[35] The Interior Department's Bureau of Reclamation, which continued to follow the basic policy and principles set forth in the MOU (J.A. 147-151), reviewed ETSI's request, discussed it with the Army Corps of Engineers, and negotiated a water service contract for the proposed diversion (J.A. 212-223). The Secretary of the Interior approved the contract and it was signed on behalf of the United States on July 2, 1982 (J.A. 224-256).

Shortly thereafter, respondents brought a suit against ETSI, the Secretary of the Interior, and the Secretary of the Army, challenging the contract and the associated federal permits and approvals. South Dakota, which had issued the underlying state water use permit, attempted to intervene in the matter. However, a magistrate denied that request (Mem. Op. No. CV82-L-442 (D. Neb. Jan. 13, 1983)). The district court later rejected the government's objections that the lower basin states lacked standing to challenge the ETSI contract (Mem. Op. No. CV82-L-442 (D. Neb. Mar. 7, 1984)).

With respect to the merits, respondents contended, among many other allegations, that the Secretary of the Interior lacked statutory authority to enter into a water service contract with ETSI. The government responded that Congress, by approving the Pick-Sloan Plan in Section 9 of the Flood Control Act, authorized the Secretary of the Interior to administer water stored for irrigation

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[35] See note 29, *supra*. ETSI first petitioned the Army and Interior for a water service contract in 1973. *1975 Industrial Water Marketing Hearing* 9, 436-438. Since that time, ETSI had obtained a state water use permit through assignment from the South Dakota Conservancy District for its proposed use (J.A. 152-206), the Interior Department's Bureau of Land Management had prepared an Environmental Impact Statement evaluating ETSI's project (J.A. 213), and the Army Corps of Engineers had prepared an Environmental Assessment addressing ETSI's proposed intake structure at Lake Oahe (J.A. 213-214).

at the Missouri River mainstem reservoirs and that Section 9(c) of the Reclamation Project Act specifically authorized the Secretary to market that water for industrial use. The district court disagreed and permanently enjoined performance of the ETSI water service contract (Pet. App. 45a-72a).

The court focused on Section 9(c) of the Flood Control Act, which provides that "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891). It reasoned that this Section permits the Secretary to invoke the reclamation laws only where the Bureau had undertaken "reclamation or power developments" (Pet. App. 53a-54a). The court concluded that "Oahe Dam was not a reclamation or power development to be undertaken by the Secretary of the Interior pursuant to § 9(c) of the Flood Control Act" (*id.* at 54a). Instead, it "was built under § 9(b), which concerned projects to be built by the Corps" (*ibid.*).[36]

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[36] Following the district court's injunction, ETSI announced that it had decided to suspend the coal slurry project. Prior to argument, the court of appeals remanded the case to the district court for a determination of mootness. The district court concluded that a live controversy remained because the contract had not been terminated or abandoned and because the contract was part of Interior's basin-wide water marketing program (U.S. Reply Br. Addendum 3a-7a). The court of appeals subsequently affirmed that conclusion (*id.* at 1a-2a). Meanwhile, the State of South Dakota, excluded from direct participation in this case, sought leave to file an original action in this Court against the States of Nebraska, Iowa, and Missouri. *South Dakota* v. *Nebraska*, No. 103, Orig. (Mar. 31, 1986). South Dakota urged that the Flood Control Act effected a statutory apportionment of the Missouri River, giving South Dakota control over the use of waters stored for irrigation in the Corps of Engineers' Missouri River mainstem reservoirs within that state. The United States, in response to this Court's invitation, filed a brief *amicus curiae* suggesting that the Court defer action on South Dakota's application for leave to file a complaint pending resolution of the instant case by the court of appeals. This Court subsequently permitted the State of North Dakota to intervene and dismissed South Dakota's application without prejudice (No. 103, Orig. (Mar. 31, 1986)). On October 1, 1986, South Dakota renewed its motion for leave to file a complaint.

The court of appeals affirmed the district court's judgment (Pet. App. 1a-44a). It first rejected the government's standing and jurisdictional arguments (*id.* at 11a-15a & n.7), which we no longer assert in this Court. Following the district court's analysis, it then stated that "[t]he inquiry in this case is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to section 9(c) of the [Flood Control] Act" (*id.* at 19a). The court of appeals agreed with the district court that Oahe is not a reclamation development and rejected the government's argument that the Pick-Sloan Plan authorizes the Secretary of the Interior to exercise control over water stored in Lake Oahe for irrigation use. It stated that "Section 9 of the Act simply adopts the projects proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior" (*id.* at 23a-24a). The court cited other provisions of the Flood Control Act to support its conclusion (*id.* at 24a-32a) and refused to defer to the Secretary's contrary interpretation (*id.* at 32a-35a). Judge Bright dissented (*id.* at 36a-44a) and an equally divided court denied rehearing en banc (*id.* at 74a-75a).[37]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress approved the Pick-Sloan Plan to serve the needs of the entire Missouri River Basin by providing the arid and semi-arid upper basin states with irrigation water while promoting commerce and protecting the lower basin states from seasonal floods. The Pick-Sloan program has met the flood control and navigation needs

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[37] Judge Bright concluded that the Secretary's interpretation is a reasonable construction of ambiguous statutory language and therefore entitled to deference (Pet. App. 36a). He noted that the majority's construction would deprive Interior of authority to manage the waters contained "in the largest federal reservoir in the Missouri Basin—a reservoir located in an upstream state and designed with the anticipation that its major consumptive use would be irrigation" (*id.* at 43a). Judge Bright, as a senior judge, was not eligible to participate on the request for rehearing en banc.

of the lower basin states and has provided full development of hydroelectric power; however, the upper basin's anticipated irrigation needs have not yet materialized. The question now is whether the Secretary of the Interior may distribute unutilized irrigation water from the mainstem reservoirs for other state-approved beneficial uses.

The answer to this question would seem almost self-evident. Congress approved a flexible program, jointly administered by the Department of the Army and the Interior Department, that could respond to the evolving water resource requirements of the basin states. The Interior Department's distribution of presently unneeded irrigation water to other state-approved beneficial uses is fully consistent with the intentions of Congress and with desires of the arid upper basin states, which supported the Pick-Sloan Plan in the expectation that they would be permitted to put the vast amounts of water impounded within their borders to beneficial use. Respondents' legal objections are insubstantial and reflect a parochial unwillingness to share the Missouri River Basin's resources for the benefit of the nation.

Section 9 of the Flood Control Act provides the Secretary of the Interior with legal authority to enter into the ETSI contract. Section 9(a) approves the Pick-Sloan Plan, which specifically grants the Secretary of the Interior authority to administer the reclamation aspects of the program. That authority, under the specific terms of the Plan, includes the power to dispose of waters stored for irrigation at the mainstem reservoirs. Section 9(c) of the Flood Control Act provides, in turn, that the Secretary shall exercise his authority in accordance with the federal reclamation laws. Those laws specifically permit the Secretary to supply reclamation water for industrial use. See Reclamation Project Act of 1939, § 9(c), 43 U.S.C. 485h(c). Thus, the Secretary may supply water stored but not needed for irrigation at Lake Oahe to ETSI for that company's proposed industrial application.

The Secretary of the Interior's conclusion that he is authorized to enter into the ETSI contract finds additional support outside the specific language of Section 9 of the Flood Control Act and the Pick-Sloan Plan. First, it is consistent with the overall objectives of Congress, which passed the Flood Control Act to provide a comprehensive yet flexible program for development of the Missouri River Basin that would provide maximum basin-wide benefits. The Secretary's marketing of water intended but not presently needed for irrigation purposes plainly advances that goal. The Secretary's interpretation of Section 9 is further supported by the established practices that have historically governed the administration of the Pick-Sloan Plan. Those practices demonstrate that the Army and the Interior Department have long recognized that each agency plays an important role at each facility based on the functions that the facility is designed to fulfill. The Secretary's undertaking to provide unutilized irrigation water from Army-operated facilities for industrial purposes is simply one example of that functional division of authority.

In these circumstances, the Secretary of the Interior's interpretation of his powers under Section 9 of the Flood Control Act is entitled to deference from the courts. The Secretary's interpretation is plainly reasonable. And deference is particularly appropriate here, where the governing statute is written in broad language, the Secretary was intimately involved in the creation of the legislative program, he has consistently adhered to his interpretation, and Congress has expressed no dissatisfaction with his construction of the statute.

ARGUMENT

THE SECRETARY OF THE INTERIOR MAY ENTER INTO CONTRACTS, PURSUANT TO THE FEDERAL RECLAMATION LAWS, TO SUPPLY UNUTILIZED IRRIGATION WATER FROM MISSOURI RIVER MAINSTEM RESERVOIRS FOR INDUSTRIAL USE

The question in this case is whether the Secretary of the Interior may enter into a contract pursuant to the federal reclamation laws to supply the ETSI Pipeline Project with water, presently stored but not utilized for irrigation purposes at Lake Oahe, for ETSI's proposed industrial use. We submit that the Secretary correctly determined that he possesses such authority. That determination is consistent with the language and purpose of the Flood Control Act, as well as with the actual design and longstanding administration of the Pick-Sloan Plan. The Secretary's interpretation of his authority is plainly reasonable and entitled to deference from the courts.

I. Congress, In Approving The Pick-Sloan Plan, Authorized The Secretary Of The Interior To Administer The Reclamation Aspects Of Mainstem Reservoirs, Including Disposition Of Water Stored, But Not Presently Needed, For Irrigation Use

Our analysis begins, of course, with the language of the controlling statute, Section 9 of the Flood Control Act.[38] Section 9(a), through its approval of the Pick-Sloan Plan, grants the Secretary of the Interior authority to administer the reclamation aspects of the program. And Section 9(c) specifies, in turn, that the Secretary shall exercise that authority in accordance with the federal reclamation laws, including the Reclamation Project Act of 1939, which specifically permits the Secretary to

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[38] See, *e.g.*, *United States* v. *James*, No. 85-434 (July 2, 1986); *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 5; *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 735 (1985); *United States* v. *Yermian*, 468 U.S. 63, 68 (1984); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979).

supply irrigation water for industrial use. § 9(c), 43 U.S.C. 485h(c). Thus, the Secretary may supply water stored for irrigation at Lake Oahe to ETSI for that company's proposed industrial application.

A. Section 9(a) of the Flood Control Act

Section 9(a) of the Flood Control Act specifically approved the comprehensive program for the Missouri River Basin set forth in the Pick Plan, the Sloan Plan, and the Corps-Bureau coordinating report (58 Stat. 891). Those documents, which express the basic expectations of Congress and the implementing agencies,[39] specify that the Secretary of the Interior shall administer the reclamation aspects of the mainstem reservoirs for maximum beneficial use. The documents indicate that the Secretary's authority extends to disposition of water stored, but not presently used, for irrigation purposes.

The Pick Plan articulates three principles of particular relevance to this case. First, it proposes that the Missouri River Basin program be constructed and administered to assure that the Missouri River's waters are put to full and efficient use. H.R. Doc. 475, *supra*, at 3-5.[40]

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[39] When Congress approves a proposed plan for such projects, it adopts the basic policy for the systematic development of the river basin set forth in the accompanying reports. See *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 163 (1953). Senator Overton described the process for formulation and congressional review of public works projects in considerable detail. See 90 Cong. Rec. 8227-8228 (1944) (Sen. Overton). As he later explained, "the course has not been to reproduce an entire report in the bill, but simply to refer to the report * * *. Then the projects are authorized pursuant to the report. There could not very well be any other legislative process" (*id.* at 8564). See also *H.R. 4485 Senate Hearings* 667 (Col. Reber).

[40] "It is evident that all the Federal agencies concerned agree that the maximum feasible multiple-purpose use of water and the broadest economic program of reservoirs for that type of use are the primary principles on which the planned development of the water resources of the Missouri River Valley should be based." H.R. Doc. 475, *supra*, at 3. See *H.R. 4485 House Hearings* 1065, 1076 (Col. Reber); *H.R. 4485 Senate Hearings* 513-514, 650, 669 (Col. Reber). See also pages 5-6, *supra*.

Second, it indicates that the program must be sufficiently flexible to permit adjustment in response to changing needs of the basin (*ibid.*).[41] And third, it emphasizes that the Secretary of the Interior shall administer the reclamation aspects of the proposed program, including disposition of water stored for irrigation purposes. The Pick Plan describes the functional division of authority between the Corps and the Bureau as follows (H.R. Doc. 475, *supra*, at 3-4 (emphasis added)):

> It is essential * * * that the mainstem projects be built, operated, and maintained by the Corps of Engineers, and that the utilization of storage reserved for flood control in all multiple-purpose reservoirs on tributaries be in accordance with regulations prescribed by the Secretary of War * * *. *Conversely, utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior.*

The Pick Plan thus places responsibility for the day-to-day operation of the mainstem reservoirs with the Army, but provides that the Secretary of the Interior shall prescribe how waters, collected for irrigation purposes, should be applied for optimal reclamation use.

The House was plainly aware of, and approved of, this functional division of authority when it included the Pick Plan among the projects authorized by the House bill.[42]

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[41] "It is equally evident that to accomplish this type of development, the details of planning must be worked out in a progressive manner through the correlation and coordinated efforts of all agencies, Federal, State, and local, concerned with these resources. Due allowance must be made for any changed conditions that may arise in the future." H.R. Doc. 475, *supra*, at 3. See *H.R. 4485 House Hearings* 1065-1066 (Col. Reber); *H.R. 4485 Senate Hearings* 508, 513-514, 669, 671, 695 (Col. Reber). See also pages 5-6 & n.8, *supra*.

[42] Thus, Rep. Case stated, "I know by the testimony before the Flood Control Committee and by specific statements made over the signature of the Chief of Engineers and by the provisions of House Document 475, which is referred to in the Missouri River

Indeed, it approved the extension of similar authority to all of the flood control programs contained in the House bill by providing—in Section 6—that whenever the Secretary of the Army determines that an Army-operated reservoir could be used for reclamation purposes, "it shall be the duty of the Secretary of the Interior to prescribe regulations for the use of the storage available for such purpose" (H.R. Rep. 1309, *supra*, at 8, 53).[43]

The Sloan Plan, which was issued several months after the Pick Plan, also proposes that the Missouri River Basin be developed in a comprehensive, yet flexible, manner that assures full and efficient use of the available water resources. See S. Doc. 191, *supra*, at 1-4, 10-11.

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paragraph, that it is contemplated the Bureau of Reclamation shall operate all reclamation that may grow out of the storage or [*sic*] main stem, and most specifically that the Bureau of Reclamation shall develop as much irrigation as it wants to on any of the tributaries or branches of the Missouri River and that the Army engineers care nothing about it." 90 Cong. Rec. 4141 (1944). He later added, "It will be clear * * * from this record, that there is no objection by the Army engineers to the program of Reclamation for handling irrigation water and for constructing and operating irrigation works" (*id.* at 4147).

[43] The provision received extensive discussion in the House debate. See 90 Cong. Rec. 4126 (1944) (Rep. Whittington) ("Section 6 * * * gives to the Secretary of the Interior power of handling reclamation and the disposal of reclamation waters provided by the projects authorized in this bill."); *id.* at 4134 (Rep. Curtis) ("The thing that we have done in this bill is to state that in any reservoir where there is storage space available for irrigating farmlands that the regulation of that shall be turned over to the Bureau of Reclamation, which is a concession on the part of the Army."); *ibid.* (Rep. Curtis) ("We have stated in this bill that control with reference to the available space for irrigation water shall be exercised by the Bureau of Reclamation."); *id.* at 4141 (Rep. Whittington) ("[T]he Corps of Engineers is not going to do a thing on earth except to make the water there available to [the Bureau of Reclamation], when there is water for reclamation."). The Senate later modified the language of this section (renumbering it as Section 8) but, as we discuss later (see notes 45, 71, *infra*), that modification did not change the basic goal of the provision or alter the Interior Department's authority over the reclamation aspects of the Pick-Sloan program.

Furthermore, it designates the same functional division of authority prescribed by the Pick Plan (*id.* at 3-4). The Sloan Plan specifically states (*id.* at 11 (emphasis added)):

> All reservoirs where flood control and navigation are dominant should be operated by the Corps of Engineers, and where flood control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. * * * *All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.*

Thus, the Pick Plan and the Sloan Plan are in complete accord in designating the division of authority between the Army and Interior. Both plans provide, quite sensibly, that each agency shall have authority at the various reservoirs to administer the functions that fall within the particular agency's mission and expertise.[44]

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[44] Notably, President Roosevelt fully supported this functional division of authority. He stated in a February 7, 1944 letter to Rep. Whittington (90 Cong. Rec. 8623 (emphasis added)):

> In my letter of May 5, 1941, I suggested that a sound policy in connection with [multiple purpose] water projects would consist of selecting the construction agency by determining the dominant interest. * * * *No matter which agency builds a multiple-purpose structure involving in even a minor way the interests of the other, the agency with the responsibility for that particular interest should administer it in accordance with its authorizing legislation and general policies. For example, the Bureau of Reclamation * * * should administer, under the reclamation laws and its general policies those irrigation benefits and phases of projects built by the Corps of Engineers.*

As Senator O'Mahoney later explained, the President himself played a role in achieving the Pick-Sloan compromise. See *id.* at 8489; see also *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the*

The Corps-Bureau coordinating document served to reconcile the differences between the Pick and Sloan plans. See S. Doc. 247, *supra*. Because the plans agreed on the proper division of administrative authority, there was no need for the coordinating document to address that issue. Instead, the document addressed certain basic design differences between the two plans, involving the size and location of the mainstem reservoirs (see pages 11-12, *supra*). Notably, however, the document resolved the design differences through a functional division of authority analogous to that employed for the administrative features of the Pick and Sloan plans: the Corps would determine water storage capacities for flood control and navigation purposes at each mainstem reservoir, while the Bureau would determine water storage capacities for reclamation purposes at those same reservoirs. S. Doc. 247, *supra*, at 1; see pages 11-12, *supra*.

Thus, when the Senate turned to H.R. 4485, there was no dispute between the Corps and the Bureau over how design and administrative authority in the Missouri River Basin should be allocated. See 90 Cong. Rec. 8375 (1944) (Sen. Overton). The Corps and the Bureau had already reached a full consensus on the matter through coordination of the Pick and the Sloan Plans, and Congress, through Section 9(a) of the Flood Control Act, simply ratified the inter-agency agreement contained in the three relevant documents (90 Cong. Rec. 8553 (1944)).[45] In-

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Senate Comm. on Public Works, 85th Cong., 1st Sess. Pt. 1, at 320 (1957) [hereinafter *1957 Senate Hearings*].

[45] Congress also retained the substance of Section 6 of the House bill (renumbered as Section 8), which specified how administrative authority should be divided for *other* flood control programs where no such inter-agency cooperative arrangements had been worked out in advance. The Senate made certain technical changes to that section at Secretary Ickes' suggestion (see notes 15 & 17, *supra*) that were intended simply to reflect that reclamation laws are largely designed to authorize a system of contractual relationships. See generally *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093, 1105-1111 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). Those changes could not, of course, alter the spe-

deed, when Congress modified the Pick-Sloan program twelve years later, approving construction of two additional tributary dams (Act of May 2, 1956, ch. 231, 70 Stat. 126), the accompanying Senate report described the longstanding arrangement as an accepted feature of the program, stating that "the Secretary of the Interior is responsible for the disposal of water for irrigation or space reserved for this purpose in any of the dams in the Missouri River Basin project, while the Secretary of the Army is responsible for flood-control regulation." S. Rep. 1066, 84th Cong., 1st Sess. 3 (1955).

Section 9(a) of the Flood Control Act, through its approval of the Pick-Sloan Plan, thus answers the question of who should ensure that water stored but not presently needed for irrigation purposes at Lake Oahe is put to maximum beneficial use. The Secretary of the Interior is responsible "for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development" (S. Doc. 247, *supra*, at 1). He is responsible for administration of reclamation functions (S. Doc. 191, *supra*, at 11) and the "utilization of storage reserved for irrigation" (H.R. Doc. 475, *supra*, at 4). It naturally follows, under the Pick-Sloan Plan's functional division of authority, that he is authorized to determine the proper application of irrigation waters not presently needed for irrigation use.

B. *Section 9(c) of the Flood Control Act*

Section 9(a) of the Flood Control Act authorizes the Secretary of the Interior to administer all reclamation

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cifically agreed-upon and independently approved division of administrative authority for the Pick-Sloan program. It is well settled that special provisions prevail over general ones which, in the absence of the special provisions, might otherwise control. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 158 (1976); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 756, 758 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957); *Missouri* v. *Ross*, 299 U.S. 72, 76 (1936); *Kepner* v. *United States*, 195 U.S. 100, 125 (1904).

aspects of the resulting water resources program. But the Secretary does not have unbridled discretionary power. Section 9(c) of the Act makes clear that the "reclamation and power developments to be undertaken by the Secretary under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891). Section 9(c) thus identifies the source of law—namely, federal reclamation law—that governs *how* the Secretary shall exercise his authority. The Secretary has looked to that body of law to determine how to apply Lake Oahe's unutilized irrigation water to other beneficial uses. He has relied specifically—and, we submit, quite properly—on another Section 9(c), Section 9(c) of the Reclamation Project Act of 1939, which permits him to "enter into contracts to furnish water for municipal water supply or miscellaneous purposes" provided that the contracts "will not impair the efficiency of the project for irrigation purposes" (43 U.S.C. 485h(c)). See J.A. 120-127.[46]

There is no legislative history explicitly describing the interplay of Section 9(a) and Section 9(c) of the Flood Control Act. See 90 Cong. Rec. 8553 (1944). We submit, however, that the Congress's objective is apparent. Congress originally drafted the Flood Control Act of 1944 as a vehicle for authorization of Army flood control programs, including the Pick Plan. It recognized, however, that it could not simply add the Sloan Plan—an Interior-conceived reclamation program—to the list of Army flood control programs. Congress therefore formulated Section 9 specifically to address the hybrid character of the Pick-Sloan Plan. Section 9(a) approved the Pick and Sloan Plans, as coordinated by the Corps-Bureau agreement. Section 9(b) ensured that the Army-constructed works would be integrated with pre-existing Army flood control

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[46] As the court of appeals recognized (Pet. App. 30a n.21), it is not disputed that the Secretary may rely on this provision when entering into industrial water service contracts for irrigation water stored at the Bureau of Reclamation's Pick-Sloan tributary facilities. See *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), aff'g in pertinent part, *Environmental Defense Fund, Inc.* v. *Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

structures. And Section 9(c) satisfied the wary arid states that the Pick-Sloan Plan's reclamation activities, though authorized in a flood control act, would nevertheless be governed by familiar principles of federal reclamation law.[47]

The court of appeals rejected this sensible interpretation of Section 9. The court mistakenly concluded that Section 9 "simply adopts *the projects* proposed in the Pick-Sloan plan and directs that the reclamation laws apply to those undertaken by the Secretary of the Interior" (Pet. App. 23a-24a (emphasis added)). It stated that the only inquiry in this case "is whether Lake Oahe is a reclamation development undertaken by the Secretary of the Interior pursuant to Section 9(c)" (*id.* at 19a). We submit that this is the wrong question. The court's central premise—that the Secretary can exercise reclamation authority only at Bureau-constructed projects—cannot be squared with Section 9 and the Pick-Sloan scheme.

As an initial matter, Section 9(a) of the Flood Control Act quite plainly approves "general comprehensive plans" (58 Stat. 891) and not merely the projects contained

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[47] See note 59, *infra*. Congress took similar action with respect to Section 8 of the Flood Control Act, which permits the Secretary of the Interior to construct reclamation works at other dams (not authorized under Section 9) constructed by the Army. See FCA § 10, 58 Stat. 891. That section, when originally drafted by the House committee (and then numbered Section 6) simply provided that the Secretary of the Interior would prescribe regulations governing reclamation use of Army reservoirs. See H.R. Rep. 1309, *supra*, at 53. The chairman of the House Flood Control Committee, Rep. Whittington, received objections that the Commissioner of Reclamation might "prescribe regulations ad libitum without regard to existing law" (90 Cong. Rec. 4202 (1944)). The House therefore amended that section to require that the Secretary prescribe regulations "under existing reclamation law" (*ibid.*). When Section 8 emerged from the Senate committee, it contained a provision substantially identical to that contained in Section 9(c), requiring compliance with "the Federal reclamation laws" (58 Stat. 891). See *Tulare Lake Canal Co.*, 535 F.2d at 1104-1111.

therein.[48] It therefore approves the division of administrative authority specified in three complementary documents that comprise the Pick-Sloan Plan. Second, as we have explained (pages 24-28, *supra*), those three documents specify that the Secretary shall administer *all* of the reclamation aspects of the program; they do not limit the Secretary's authority to those physical works that the Bureau of Reclamation has constructed. And third, Section 9(c)'s requirement that "reclamation and power developments to be undertaken by the Secretary * * * under said plans shall be governed by the Federal Reclamation Laws" (58 Stat. 891) was enacted to ensure that the Secretary's resulting broad powers, including the authority to distribute irrigation water, will be exercised in accordance with federal reclamation law. Section 9(c) was intended to eliminate any doubt that the Secretary's activities under the Pick-Sloan Plan would be governed by familiar reclamation principles. There is no reason to believe that Congress enacted Section 9(c) to override an inter-agency plan for cooperation by *preventing* the Secretary from administering the reclamation aspects of Army-constructed facilities.[49]

The court of appeals' inquiry (Pet. App. 19a-20a) into whether the Department of the Interior constructed or operates Lake Oahe accordingly is misdirected. The Secretary need not pour concrete or turn valves to engage in "reclamation developments" within the meaning of Section 9(c). The dictionary meaning of the word "development" plainly embraces activities other than construction of physical works and specifically includes the act of "making usable or avaliable" (*Webster's New In-*

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[48] See H.R. Conf. Rep. 2051, *supra*, at 7-8; 90 Cong. Rec. 9284 (1944) (Rep. Curtis) (explaining that the Pick Plan and the Sloan Plan are each "approved and authorized" as coordinated by the Corps-Bureau report).

[49] As Rep. Curtis stated in presenting the House conference report, "This legislation retains for the Army engineers authority over flood control and retains for the Bureau of Reclamation authority over irrigation. It lays down a pattern for their future cooperation." 90 Cong. Rec. 9284 (1944).

ternational Dictionary 618 (3d ed. 1976)).[50] Thus, when the Secretary defines the irrigation storage needs at mainstem reservoirs, determines the proper disposition of the resulting impounded water, or enters into contracts to make that water available for a recognized reclamation use (see note 46, *supra*), he is engaged in a reclamation development.[51] Congress plainly understood that the Secretary would administer reclamation storage at Army reservoirs as well as construct and operate Bureau of Reclamation facilities.[52] The court of appeals'

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[50] Indeed, when Congress wished to describe particular physical works in Section 9's other subsections, it specifically used the word "works." See FCA § 9(b), (d), and (e), 58 Stat. 891. The significant linguistic differences between the words used in these adjoining subsections strongly indicates that Congress intended the term "reclamation developments" to have a broader meaning than the term "works." See *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 9.

[51] Notably, Section 9(c) provides that "reclamation * * * developments *to be* undertaken by the Secretary" shall be subject to the federal reclamation laws (58 Stat. 891 (emphasis added)). Thus, Section 9(c) requires the Secretary to apply federal reclamation law to activities "to be undertaken" at some future date as well as those actually undertaken and completed. It naturally follows that the Secretary should also look to federal reclamation law to determine how best to use water resources that are made available when, as in the present case, the construction of planned irrigation works is suspended.

[52] As Rep. Whittington, chairman of the House Committee on Flood Control, stated, "public policy requires not only that flood control storage be under the supervision of the Secretary of War and the Chief of Engineers but also that *storage for the reclamation of arid lands* be under the supervision of the Secretary of the Interior" (90 Cong. Rec. 4127 (1944) (emphasis added)). See also *id.* at 4126 (Rep. Whittington) (the Secretary is responsible for "reclamation *and* the disposal of reclamation waters provided by the projects authorized in this bill") (emphasis added); *id.* at 4130 (Rep. Curtis) (the bill "gives the Bureau of Reclamation jurisdiction over the irrigation features of the reservoirs *and* the distribution systems") (emphasis added); *id.* at 4134 (Rep. Curtis) ("control with reference to the *available space for irrigation water* shall be exercised by the Bureau of Reclamation") (emphasis

contrary determination undermines a fundamental pillar of the Pick-Sloan Plan.

II. The Secretary's Interpretation Of Section 9 Of The Flood Control Act Is Consistent With The Stated Objectives Of Congress And The Overall Plan For Administration Of The Pick-Sloan Program

The Secretary's conclusion that he is authorized to enter into contracts providing water from mainstem reservoirs for industrial use finds additional support outside of the specific language of Section 9 and the Pick-Sloan Plan. His conclusion is fully consistent with the goals that Congress expressed in approving the Pick-Sloan program and with the established practices of the Army and the Interior Department for its effective administration.

A. *The Objectives of Congress*

This Court has repeatedly stated that when courts or agencies expound a statute, they should pay heed "to the provisions of the whole law, and to its object and policy." [53] Here, Congress passed the Flood Control Act to provide for comprehensive development of the nation's water resources. Congress specifically intended that Section 9 would authorize a flexible development program for the Missouri River Basin that would provide maximum basin-wide benefits. The Secretary's marketing of water intended but not presently needed for irrigation purposes plainly advances that goal.

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added); *id.* at 4147 (Rep. Case) ("there is no objection by the Army engineers to the program of Reclamation for handling irrigation water *and* for constructing and operating irrigation works") (emphasis added). See also note 42, *supra*. Senator Overton, chairman of the Senate Commerce Committee's Subcommittee on Flood Control expressed the same view (*id.* at 8625, 8626).

[53] *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10; *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), slip op. 6; *Offshore Logistics, Inc.* v. *Tallentire*, No. 85-202 (June 23, 1986), slip op. 13; *Mastro Platics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956); *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850).

As we have noted (see pages 24-26, *supra*), the Corps and the Bureau formulated the Pick-Sloan Plan to ensure that the Missouri River's waters would be put to their best use. Congress fully supported that objective and repeatedly expressed the importance of maintaining flexible programs that would utilize the Missouri River's waters to meet the basin's evolving needs. For example, the House Report states (H.R. Rep. 1309, *supra*, at 24):

> [T]he committee is of the opinion that the works recommended by the Chief of Engineers will form a broad framework for the comprehensive development of the entire Missouri River Basin in the interest of flood control, irrigation, power development, navigation and other purposes and that the adjustment of the water use to meet the changing needs of the Missouri River Basin as a whole can and will be made if the comprehensive development proceeds step by step toward ultimate accomplishment.

See note 41, *supra*.[54] The Senate, in its debate, fully agreed on the need for flexibility, and established, in

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[54] See also, *e.g.*, 90 Cong. Rec. 4132 (1944) (Rep. Curtis) ("The proposed plan is subject to modification as conditions warrant or as a result of further studies now being prosecuted and to be prosecuted in the future."); *id.* at 4133 (Rep. Curtis) ("The report of the Army engineers * * * is submitted * * * as a flexible plan, designed with the thought that all problems, controversies, and differences among localities, agencies, and individuals cannot be solved in advance, that by cooperation and coordination of effort between the agencies, needed changes can be made in the future."); *id.* at 4214 (Rep. Mansfield (Mont.)) ("There is no reason why a sound, well integrated economy cannot be equitably worked out between the Army engineers and the Bureau of Reclamation so that the waters of the Missouri and the Yellowstone can be utilized to their fullest extent, first, for domestic purposes, such as irrigation, mining, industrial and municipal uses, and then for flood control and navigation."); *id.* at 4218 (Rep. Hoeven (Iowa)) ("By these proposed improvements not only would large flood damages be prevented * * * but also floodwater would be retained for their [*sic*] best uses for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation."); *id.* at 4224 (Rep. Carlson (Kan.)) ("During the testimony before the committee * * * it

addition, a federal policy that navigational uses should not conflict with beneficial consumptive uses in states lying west of the 98th meridian. FCA § 1(b), 58 Stat. 889.[55]

Congress plainly understood that the Army and the Interior Department could provide the most effective utilization of the Missouri River's waters through a functional division of authority over the Pick-Sloan program's multiple purpose reservoirs. While only one agency can conduct the day-to-day operation of a reservoir, both agencies can and should participate in the multiple purpose management scheme. The Corps of Engineers, which has extensive experience in improving waters for navigation and flood control, is clearly best equipped to determine how multiple-purpose reservoirs should be administered to meet those needs. Similarly, the Bureau, which has extensive experience in delivering water for irrigation and allied uses, is best situated to determine how those reservoirs should be administered for reclamation purposes. The Pick-Sloan Plan's division of authority takes full advantage of each agency's particular expertise. There is no reason why this sensible approach should not be applied to administration of stored water

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was brought out that the entire program was flexible and the final construction of it would be through a coordinated policy approved by the Federal, State, and local areas."); *id.* at 9284 (Rep. Curtis).

[55] See 90 Cong. Rec. 8376 (1944) (Sen. Overton) ("Modifications must be made wherever necessary, and I think it would be a very unsound thing for the Congress to authorize the development of any basin and not give authority to those entrusted with the development to make such minor modifications as may be necessary."); *id.* at 8547 (Sen. Millikin (Colo.)) ("[W]e have no crystal bowl [*sic*] here which we can use to foresee the future and we certainly do not want to preclude any industrial development which it might be possible to bring about."); see also *id.* at 8544 (Sen. Overton) ("When a comprehensive plan is adopted in connection with the recommendations of the engineers, the provision that the Chief of Engineers may make modifications becomes a part of the law without being so expressed in the statute.").

at the Missouri River mainstem reservoirs. A functional division of authority over reservoir storage is not only consistent with Section 9 of the Flood Control Act (see pages 23-34, *supra*), it also promotes the optimal utilization of the basin's water resources.

The situation at Lake Oahe demonstrates that point. As the Corps-Bureau coordinating report explains, the Army and Interior agreed to a reservoir design that would satisfy the needs of both agencies. See S. Doc. 247, *supra*. A large capacity reservoir, impounding approximately 19.6 million acre-feet of water, was selected primarily to provide the Bureau with irrigation water for the James River Basin (*id.* at 3; S. Doc. 191, *supra*, at 115-116 (see note 29, *supra*)), and the final capacity of 23.34 million acre-feet, was selected following the agencies' more detailed assessment of their needs. But as a result of the postponement or abandonment of planned irrigation projects, Interior's anticipated water needs at Lake Oahe for irrigation purposes have not yet materialized. In these circumstances, Interior is the logical agency to determine the best use for the resulting unutilized supply.

First, Interior, through its Bureau of Reclamation, determined Lake Oahe's irrigation storage capacity and is thus intimately familiar with the total amount of water stored for reclamation purposes. Second, it designed the discontinued irrigation works and thus is best situated to determine the amount of water that is presently available for alternative use. Third, as the federal agency generally responsible for reclamation activities, it can best forecast the duration of water availability in light of anticipated future reclamation needs, select among the alternative reclamation applications, and specify appropriate conditions that will attach to the resulting water service contracts. In short, Interior is the agency best suited to determine how to put the available water here to its optimal use.[56]

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[56] The Interior Department must, of course, coordinate its water marketing decisions with the Army, which has its own water

Thus, the Secretary's exercise of marketing authority is not only consistent with the basic terms of the Flood Control Act, it also comports with the fundamental congressional policy that the Pick-Sloan program would be administered flexibly to assure that the Missouri River's waters are put to their most beneficial use. The court of appeals' conclusion that the Secretary is forbidden from utilizing Lake Oahe's waters because he had not yet built physical irrigation works at the facility (Pet. App. 20a) cannot be squared with that policy. There is no plausible reason why Congress would have wished to condition the Secretary's power to promote optimal utilization of water resources on the presence or absence of presently unneeded irrigation canals.

The court of appeals suggests that its result does not "leave the irrigation storage in Oahe without an agency to administer it" because the "Secretary of the Army retains the authority, pursuant to Section 6 of the [Flood Control] Act to use any surplus water in Army-controlled reservoirs for domestic or industrial purposes" (Pet. App. 29a n.20).[57] It is far from clear, however, that the Secretary of the Army can fill the Secretary of the Interior's shoes.[58] More importantly, the court's citation to the

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marketing authority under Section 6 of the Flood Control Act. But Interior has always recognized that responsibility (see J.A. 147-151) and it followed that practice in this case (see J.A. 212-223).

[57] Section 6 provides in relevant part that the Secretary of the Army "is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water * * *" (58 Stat. 890). See notes 11, 15, 17, *supra*.

[58] While the legislative history makes clear that Section 6 was intended to grant the Army authority comparable to that exercised by the Interior Department under the reclamation laws (90 Cong. Rec. 4134 (1944) (Rep. Whittington)), the Army, in the past, has defined "surplus water" as "water trapped or stored in a reservoir project which is not utilized to fulfill an authorized project purpose." Army Project Purpose Planning Guidance Reg.

Army's authority misses the point. The Army and the Interior Department can best administer the multiple purpose reservoirs if *both* agencies have authority to supply unneeded water to its best possible uses. The Army and the Interior Department should be allowed to determine, through consultation and coordinated review, which agency is best suited to supply water in light of the Pick-Sloan Plan's functional division of authority and the particular circumstances presented. This approach not only is consistent with congressional intent and maximizes the effectiveness of the multiple purpose reservoirs, it also reduces federal-state tensions in those cases where a state may prefer that one federal agency, rather than another, dispense water within its borders.[59]

1105-2-20, § 7.3(c) (Jan. 29, 1982). See J.A. 209-210. Under that definition, water stored at mainstem reservoirs that can be used for hydropower purposes would not be considered surplus water, even though it might be put more profitably to industrial use. Thus, the lower basin states contended in their second amended complaint (at paras. 100-101) that the Army—as well as Interior—lacked authority to market water from Oahe because the water stored there was not "surplus." The Army's General Counsel recently determined that such water, in certain circumstances, may be termed "surplus." See Memorandum from Susan J. Crawford, Gen. Coun., Dep't of the Army, to the Assistant Secretary of the Army (Civil Works), *Proposed Contracts for Municipal and Industrial Water Withdrawals from Mainstem Reservoirs* (Mar. 13, 1986). To date, however, the Army has not treated the unutilized water stored, but not used, for irrigation purposes at Lake Oahe as "surplus." Furthermore, the financial effect of Army marketing is quite different from that of Interior marketing. The proceeds received by the Army are deposited in the Treasury as miscellaneous receipts (FCA § 6, 58 Stat. 890) while the proceeds received by the Interior Department are applied toward repayment of the reclamation features of the Pick-Sloan program. See pages 42-44, *infra*.

[59] Section 8 of the Reclamation Act of 1902, 32 Stat. 390 (43 U.S.C. 383), specifically requires that the Secretary of the Interior proceed in conformity with state laws regarding appropriation and beneficial uses of water, unless such laws are inconsistent with congressional directives concerning the project. See generally *California* v. *United States*, 438 U.S. 645 (1978). The Corps is

B. *The Administration of the Pick-Sloan Facilities*

The Secretary of the Interior's interpretation of Section 9 of the Flood Control Act is further supported by the established practices that have consistently governed the administration of the Pick-Sloan program. Those practices, which date back to the approval of the Pick-Sloan Plan, illustrate that the Army and the Interior Department have long recognized that each agency plays an important role at each facility based on the functions that the facility is designed to fulfill. The functional division of authority is apparent in both the operational and the financial elements of the Pick-Sloan management scheme.

As Congress recognized, only one agency can be responsible for the day-to-day operations at each particular Pick-Sloan facility. See 90 Cong. Rec. 8315 (1944) (Sen. Overton). The Army and the Interior Department, following the "dominant interest" criterion set forth in the Pick-Sloan Plan,[60] divide that responsibility on the basis of which agency constructed and has a dominant interest in the facility; the Corps of Engineers operates the Corps-constructed mainstem facilities and the Bureau of Reclamation operates the Bureau-constructed tributary facilities. But this division of operational authority does not foreclose the Bureau from administering the reclamation aspects of Corps-operated facilities, nor does it prevent the Corps from regulating the flood control aspects of Bureau-operated facilities. The Corps and the Bureau

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not subject to any similar generic statutory mandate, although the directive in Section 1(b) and the proviso in Section 6 of the Flood Control Act impose some restrictions in this regard. Thus, the arid and semi-arid states may prefer that the Interior Department, rather than the Army, administer water resource programs within their borders. Congress was acutely aware of this difference when it passed the Flood Control Act (see, *e.g.*, 90 Cong. Rec. 4134 (1944) (Rep. Curtis); *id.* at 4140 (Rep. Burdick); *id.* at 8617 (Sen. Murray)) and the functional division of authority expressed in that Act reflects a sensitivity to that concern.

[60] See S. Doc. 191, *supra*, at 3-4, 11; H.R. Doc. 475, *supra*, at 3-4, 7. See also note 44, *supra*.

closely coordinate their activities at each facility; indeed, that has been the practice since the inception of the program.[61]

The Corps and the Bureau jointly develop the actual operating criteria at applicable facilities based on their respective functions. For example, the Corps operates the mainstem reservoirs under criteria that ensure that water storage is sufficient to meet Interior's reclamation needs, and the Bureau operates tributary reservoirs under criteria that satisfy the Army's flood control requirements. The Army and the Interior Department have successfully operated the Pick-Sloan facilities on this basis for more than 30 years. This functional approach ensures that each facility serves as an integrated element of a fully unified and jointly administered program; indeed, it would not be possible, as a practical matter, to operate the facilities in any other way.[62]

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[61] Shortly after the Pick-Sloan Plan was authorized, the Corps organized the Coordinating Committee on Missouri River Main Stem Reservoir Operations. See *1957 Senate Hearings* 419-432. This committee, which included representatives from various federal agencies and the affected states, ensured that reservoir operations accommodate federal and state interests "insofar as possible and consistent with the authorizations of the projects" (*id.* at 421). See U.S. Army Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual*, at VI-4 to VI-5 (1979). The Committee's coordinating functions are now carried out through semi-annual meetings and through informal Corps-Bureau consultations.

[62] Respondents (Mo. Br. in Opp. 10-11) and the court of appeals (Pet. App. 22a n.15) suggest that there is no irrigation storage at Lake Oahe because the Army has not defined and set aside a specific block of water for Interior's irrigation use. That formalistic suggestion is without merit. The Army and Interior jointly designed that reservoir to impound massive amounts of water for irrigation (S. Doc. 247, *supra*, at 3; S. Doc. 191, *supra*, at 115-116). Indeed, the reservoir's overall capacity is more than three times the size originally proposed by the Corps for its purposes and more closely coincides with the size proposed by Interior in the Sloan Plan (see note 29, *supra*). The Army, in operating the reservoirs, classifies the total storage space on the basis of four general categories: (1) exclusive flood control storage; (2)

The same approach is reflected in the financial management of the Pick-Sloan facilities. The Pick-Sloan Plan, in keeping with the basic principles of reclamation law, contemplates that the reclamation costs of the program shall be recovered through revenues obtained from water service contracts and hydropower generation. See, *e.g.*, S. Doc. 191, *supra*, at 1-2, 11, 22; see also, *e.g.*, 90 Cong. Rec. 8549 (1944) (Sen Hayden); *H.R. 4485 Senate Hearings* 210 (Commissioner Bashore); *id.* at 672 (Sen. Millikin).[63] The cost recovery requirements are applicable

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annual flood control and multiple-use storage; (3) carry-over multiple use storage; and (4) inactive storage. U.S. Army Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual*, at V-1 to V-2 (1979). See also Guhin, *supra*, S.D. L. Rev. at 411-420. The "multiple use" categories, which contain 16.79 million acre-feet of storage, include water available for irrigation as well as other multiple use purposes. See 128 Cong. Rec. 16609 (1982) (Letter from Maj. Gen. Heiberg to Sen. Moynihan, Table II). Indeed, Colonel Reber explained the practical difficulties of defining more specific storage allocations to the Senate Flood Control Committee in 1944. See *H.R. 4485 Senate Hearings* 728-730. Plainly, Interior does not lose its authority over water available for irrigation simply because the Army classifies it, for operational purposes, as part of the water available for multiple purposes.

[63] The federal reclamation laws, as a basic principle, envision that the cost of constructing reclamation facilities shall be repaid over time by the project beneficiaries. See Reclamation Project Act of 1939, § 9, 43 U.S.C. 485h. See generally, J. Sax, *Federal Reclamation Law* in 2 *Waters and Water Rights* at 111 (R. Clark ed. 1967). The Pick-Sloan Plan further refines that principle by requiring that the repayment provisions of the reclamation laws shall be applied on the basis of "basin-wide findings and recommendations regarding the benefits, the allocations of costs, and the repayments by water users" contained in the plans (§ 9(c), 58 Stat. 891). Thus, the benefits, costs, and repayment schedules are determined on the basin-wide plan for ultimate development, rather than on facility-specific calculations. See, *e.g.*, *Western Area Power Administration (Pick-Sloan Project); Order Confirming and Approving Rate Schedules, Noting Interventions, and Denying Request for Hearing*, 49 Fed. Reg. 6986 (1984). See also *S. 1915 Hearings* 40 (Mr. Sloan) ("The plan must be considered as one project for the whole basin. Any time you break it down into

to *all* facilities that contribute to reclamation, regardless of who constructed or operates them. Thus, irrigators are required to repay that portion of mainstem reservoir construction costs allocable to irrigation, including both the cost of providing irrigation storage and the cost of providing power for irrigation pumping, that is within their power to repay. See *ibid.* These financial requirements recognize that the mainstem reservoirs, like Lake Oahe, are hybrid facilities in the sense that they are dedicated to both Army and Interior functions.

The financial management of Pick-Sloan hydropower revenues specifically illustrates this point. The Pick-Sloan Plan provides that hydropower revenues from both the mainstem and tributary facilities shall be applied to recover the cost of power production and, in addition, other program costs including irrigation costs beyond the irrigators' ability to repay. See S. Doc. 191, *supra*, at 11, 25. The Army and Interior (as well as the Department of Energy, which presently administers the Pick-Sloan facilities' hydropower marketing program [64]) have long adhered to this financing requirement even at those reservoirs, like Lake Oahe, where Interior has not yet put water stored for irrigation purposes to irrigation use.[65] Lake Oahe operations accordingly contribute to

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individual projects * * * you run into trouble in allocating the benefits of these various large multiple-purpose features of the plan."). See generally Guhin, *supra*, 30 S.D. L. Rev. at 366-372.

[64] See Department of Energy Organization Act § 302(a)(1)(E), 42 U.S.C. 7152(a)(1)(E); see generally *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 4-6.

[65] See *Western Area Power Administration*, 49 Fed. Reg. 6987 (1984); *Western Area Power Administration Pick-Sloan Missouri Basin Program; Submission of Rate Order*, 47 Fed. Reg. 31738, 31740-31743 (1982); *1957 Senate Hearings* 344-353, 443-447. The Interior Department noted that practice 30 years ago, stating, "Actually, if the power revenues are not made available for aid to irrigation the proposed irrigation developments would not be feasible. Therefore, most of the irrigation would have to be left out of the project and this would require that a new cost allocation be made for the main stem reservoir system to reallocate to

reclamation financing, even though Interior has not constructed irrigation works at that reservoir.[66]

Thus, the court of appeals' treatment of the Pick-Sloan program as a series of autonomous Army and Interior Department projects is flatly inconsistent with the operational and financial character of the program. The Army and the Interior Department jointly administer the Pick-Sloan program as a single basin-wide development that is fully integrated, from both an operational and a financial perspective, to serve both Army and Interior functions. The court's conclusion that the Secretary of the Interior can market irrigation water only from those reservoirs that he has constructed runs directly contrary to that principle and cannot be squared with the established practices that have long governed the Pick-Sloan program.

III. The Secretary Of The Interior's Interpretation Of Section 9 Of The Flood Control Act Is Entitled To Deference From The Courts

As the foregoing discussion demonstrates, Section 9 of the Flood Control Act, by its own terms and by necessary implication, authorizes the Secretary of the Interior to provide unutilized irrigation water from mainstem reser-

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other project purposes, including power, the costs now allocated to irrigation" (*id.* at 446).

[66] The power rates for the midwestern states are based on the Pick-Sloan cost allocation principles and specifically include a suballocation reflecting that the proceeds from power intended but not used for irrigation pumping are credited toward interest-free repayment of basin-wide irrigation costs. See Western Power Administration, *Pick-Sloan Missouri Basin Program Power Rate Adjustment Customer Brochure* 28 (June 1984); 49 Fed. Reg. 6987 (1984); 47 Fed. Reg. 31742-31743 (1982); *1957 Senate Hearings* 446. The Interior Department's water marketing program follows the same pattern; the proceeds from providing irrigation water for industrial use are applied to defray ultimate irrigation costs. See J.A. 221. As we have noted (see note 58, *supra*), if the Army were to market available irrigation water under Section 6 of the Flood Control Act, the revenues would be deposited in the Treasury as miscellaneous receipts rather than credited toward repayment of irrigation costs. See 58 Stat. 890.

voirs for industrial use. But even if there were any doubt, the Secretary's construction of the statute should control. It is well settled that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted).[67] The agency's construction must be given effect unless the interpretation is inconsistent with a clearly expressed legislative intent. See *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11.[68] The Secretary's construction of Section 9 of the Flood Control Act amply meets that test. Indeed, the Secretary's construction is entitled to especial deference in this instance.

The Flood Control Act of 1944 is written in unusually broad language that vests the responsible agencies with extraordinarily broad discretion. Congress plainly intended to give those agencies extensive latitude in designing, constructing and administering the complex public works projects authorized in this legislation. See *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986).[69]

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[67] See, *e.g.*, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 13; *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 126 (1985).

[68] See also, *e.g.*, *United States* v. *City of Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 126 (1985).

[69] In *Fulton*, this Court held that Section 5 of the Flood Control Act, which governs hydropower generation, vests the Secretary

Such delegations are common in the case of public works projects. For example, this Court stated with respect to the Flood Control Act of 1928 (ch. 569, 45 Stat. 534):

> Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress. Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

United States v. *Sponenbarger*, 308 U.S. 256, 268 (1939) (footnote omitted). Congress's repeated expressions of the need for flexibility in administering the Pick-Sloan program (see pages 35-36, *supra*) specifically demonstrate that point in the present case.

The Secretary of the Interior is further entitled to deference because the Interior Department was intimately involved in the creation of the legislative program. See *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." *Youakim*, 440 U.S. at 144. In this instance, Congress, through its approval of the Pick-Sloan Plan, ratified a functional division of authority that was formulated by the Interior Department and the Army. The Secretary of the Interior's interpretation of that division of authority, which the Army considers acceptable, is therefore entitled to great weight. See *Adams* v. *United States*, 319 U.S. 312, 314-315 (1943). Indeed, in a very real sense, the issue in this case has been

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of Energy with broad latitude in establishing administrative procedures for ratemaking, stating that "Congress, in declining to set out a detailed mandatory procedural scheme, apparently intended to leave the agency substantial discretion as to how to structure its review" (slip op. 12). The Secretary of the Interior is entitled to even greater deference in determining the best manner for the actual management of the program, an area, unlike questions of administrative procedure, where the courts have no practical experience or expertise.

resolved, as Congress intended, within the Executive Branch.[70]

The Secretary's interpretation is also entitled to deference because the Interior Department has consistently adhered to the present interpretation since the inception of the Pick-Sloan program. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Solicitor's opinion expressing the present interpretation is now more than 12 years old (see J.A. 120-127) and the Interior Department's prior practices in administering the Pick-Sloan Plan are all consistent with the Secretary's present interpretation (see pages 40-44, *supra*). There is no reason to doubt that Secretary Ickes and Commissioner Bashore fully expected that approval of the Pick-Sloan Plan would give the Bureau of Reclamation authority over water stored for irrigation at the mainstem reservoirs.[71] Thus, the

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[70] As we have noted (see note 32, *supra*), the Army's Acting General Counsel recommended that the Army cooperate with Interior's mainstem water marketing program, but observed that Interior "may not market the water from these reservoirs independently" (J.A. 135 n.*). That qualification did not imply that Interior lacked statutory authority to supply irrigation water to industrial users; it signified only that Interior's actions must be coordinated with the Army to ensure that they do not "interfere with the operation of the reservoirs for flood control" (J.A. 135).

[71] That is, of course, what the Pick and Sloan plans specifically state (see pages 24-27, *supra*). Indeed, Secretary Ickes had sought even broader authority, urging in hearings preceding passage of the Flood Control Act, that Section 4 of the House bill (which would become Section 6 of the Act) include a proviso to "assure that the disposition of water for domestic and industrial purposes, from reservoirs serving irrigation purposes as well, * * * be handled pursuant to the Federal reclamation laws." *H.R. 4485 Senate Hearings* 312-313; see notes 15, 17, *supra*. This amendment would have greatly expanded the Interior Department's powers by giving the Bureau of Reclamation *exclusive* authority to supply water for domestic and industrial purposes at *all* Corps-constructed facilities. See *H.R. 4485 Senate Hearings* 457-458. Congress did not accept the Secretary's proposal, but *did* give him the specific

Secretary's interpretation rests upon a longstanding and consistent view of the Interior Department's role in administering the Pick-Sloan program.

Finally, Congress has been fully informed of the Secretary's practice of providing water from mainstem reservoirs and has expressed no dissatisfaction with the Secretary's exercise of that authority, even while making other changes in the law.[72] Although we do not place great

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authority, through approval of the Pick-Sloan Plan, to supply water from the Missouri River's mainstem reservoirs.

Secretary Ickes also proposed simultaneous changes to Section 6 of the House bill (which would later become Section 8 of the Act) that authorized the Secretary to add irrigation features to Corps-constructed reservoirs. See *H.R. 4485 Senate Hearings* 313, 458-459; see also notes 15, 17, *supra*. The Secretary described these changes as "technical" (*H.R. 4485 Senate Hearings* 313) and "purely for purposes of clarification" (*id.* at 458), but the court of appeals nevertheless concluded (Pet. App. 26a-27a) that they reflect an intention by the Secretary to *limit* his authority at those facilities. That inference is, of course, plainly unreasonable; the Secretary would not have sought to paralyze with one hand what he sought to promote with the other. Cf. *Escondido Mutual Water Co.* v. *La Jolla Indians*, 466 U.S. 765, 773 (1984). As we have explained (see note 45, *supra*), Section 8 does not address the Secretary's authority to supply water from Pick-Sloan facilities.

[72] The Interior Department and the Army described their mainstem water marketing activities to Congress in the course of its consideration of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1263-1274. Commissioner of Reclamation Broadbent specifically noted that Section 212(b) of the Act (codified at 43 U.S.C. 390*ll*(b)), which preserved existing repayment requirements at Corps-constructed dams (including Lake Oahe) would "assure that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." 128 Cong. Rec. 16607 (1982) (letter from Comm'r Broadbent to Sen. Moynihan). General Heiberg of the Corps noted that the Missouri River mainstem reservoir costs are allocated, in part, to irrigation and that a "portion of the mainstem storage space set aside for irrigation has been contracted for by industrial water users for interim water supplies" (*id.* at 16611 (letter from Gen. Heiberg to Sen. Moynihan)). As we have observed (see note 33, *supra*), Congress held extensive hearings on the Interior Department's water marketing program shortly after its inception in

weight on congressional inaction, Congress's failure to act does weigh in favor, rather than against, deference to the Secretary's interpretation. See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 15.[73]

Thus, we believe that the court of appeals seriously erred in holding that the Secretary's interpretation is "beyond his statutory mandate and therefore not entitled to judicial deference" (Pet. App. 33a-34a (footnote omitted)). The court's determination that the Secretary lacks "jurisdiction to decide" (*id.* at 33a) whether or not he may enter into water service contracts is plainly wrong. The Secretary *must* answer that question, either affirmatively or negatively, in carrying out his responsibilities under the Pick-Sloan Plan. And this Court has decisively rejected the notion that an agency's answer to such questions, which involve the scope of an agency's administrative authority, is not entitled to deference.[74] The Sec-

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1974 (see *1975 Industrial Water Marketing Hearing*) and took no action suggesting that the Secretary's exercise of this authority is improper. And as we noted (page 29, *supra*), a 1955 Senate report supporting legislation modifying the Pick-Sloan Plan expressly acknowledged the authority the Secretary asserts here, stating "the Secretary of the Interior is responsible for the disposal of water for irrigation *or space reserved for this purpose in any of the dams in the Missouri River Basin project*, while the Secretary of the Army is responsible for flood-control regulation." S. Rep. 1066, 84th Cong., 1st Sess. 3 (1955) (emphasis added).

[73] See also *CFTC* v. *Schor*, No. 85-621 (July 7, 1986); *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 9; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 11; *Haig* v. *Agee*, 453 U.S. 280, 301 (1981); *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 410 (1975); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969).

[74] See *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11 (giving deference to the CFTC's determination that it may entertain state law counterclaims in reparation proceedings, despite the "'statutory interpretation-jurisdictional' nature of the question at issue"); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-

retary's determination that Section 9 of the Flood Control Act authorizes him to enter into the ETSI water service contract is fully entitled to deference from the courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

FRED R. DISHEROON
KATHLEEN P. DEWEY
Attorneys

RALPH W. TARR
Solicitor

LOUIS D. MAURO
Senior Attorney
Department of the Interior

SUSAN J. CRAWFORD
General Counsel
Department of the Army

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701 (Dec. 4, 1985), slip op. 9-13 (giving deference to the Corps' determination of its regulatory jurisdiction over wetlands). See also *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7 (giving deference to the FDA's determination that it has no mandatory duty to promulgate aflatoxin regulations); *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11-12 (giving deference to the Secretary of Commerce's determination that he has no mandatory duty to sanction all foreign whale harvests in excess of international convention quotas).

ADDENDUM

STATUTES INVOLVED

Section 9 of the Flood Control Act of 1944, ch. 665, 58 Stat. 891, provides as follows:

> (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.
>
> (b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.
>
> (c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.
>
> (d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secreary of the Interior.

Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), provides as follows:

> The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrifica-

tion Act of 1936 [7 U.S.C. 901 *et seq.* and any amendments thereof]. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition to and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

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